

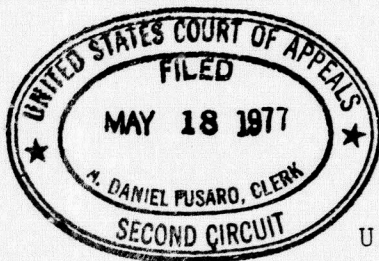
***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6062

Court of
Appeals
Copy-



SECURITIES & EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE

MAY 18, 1977

4:30 PM.

MPB

U. S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 77-6062

SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee

- v -

RESEARCH AUTOMATION CORPORATION
KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS

Defendants

KONSTANTINOS M. TSERPES and BASIL MARTOS

Defendants-Appellants

APPEAL FROM JUDGEMENT OF THE U.S. DISTRICT COURT
FROM SOUTHERN DISTRICT OF NEW YORK

72 Civil 3513

A P P E N D I X .

KONSTANTINOS M. TSERPES
BASIL MARTOS
APPELLANTS PRO SE
333 West 39 Street
New York, N.Y. 10018
Tel.(212)947-1460

B p/s

PAGINATION AS IN ORIGINAL COPY

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE RYAN

Jury demand date:

U. S. Form No. 105 Rev.

72 CIV. 3513
ATTORNEYS

TITLE OF CASE

SECURITIES AND EXCHANGE COMMISSION

-v-

RESEARCH AUTOMATION CORP. jud. 8/7/74
KONSTANTINOS M. TSERPES jud. 8/7/74
BASIL MARTOS
ATHAN HAKOS

For plaintiff:

SECURITIES and EXCHANGE COMMISSION
New York Regional Office
26 Federal Plaza
New York, N.Y. 10007
Phone: 264-1614

(Basil MARTOS & ATHAN HA
For defendant: KONSTANTINOS M. TSERPES
333 West 39th Street
New York, N.Y. 10018
Phone 947-1460

Michael Demetriou
29-14 Northern Blvd. L.I.C. N.Y. 361-0700

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISR.
I.S. 5 mailed x	Clerk	11/1/74	11/1/74		
I.S. 6 mailed	Marshal	11/1/74	11/1/74		
Basis of Action: S.E.C. Act of 1943.	Docket fee	11/1/74	11/1/74		
	Witness fees				
Action arose at:	Depositions				

BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date Order Judgment &
Aug. 17-72	Filed Complaint and issued summons.	
Aug. 24-72	Filed Order to Show Cause re: Temp. Restr. Order. Ret. 8/31/72 at 10:30 ROOM 619. Ordered that pending this motion for a pre.inj., defts. Research Automation Corp., etc. are restrained as indicated. Ryan, J.	
Aug. 17-72	Filed Affidavit and order appointing members of the staff of the commission to serve process. So ordered. Clerk.	
Aug. 24-72	Filed Affidavit in support of motion by Commission for an order of Pre Inj.	
Aug. 24-72	Filed Affidavit of Compliance with Rule 9(c)(4) of General Rules.	
Aug. 24-72	Filed Affidavit of Service of 2 conformed copies of summons and complaint on Konstantinos M. Tserpes, Pres. Research Automation Corp. on 8/18/72.	
Aug. 24-72	Filed Affidavit of Notice of attempts to contact defendants.	
Aug. 24-72	Filed Memorandum in support of Plaintiff's motion for Pre. Inj.	
Aug. 31-72	Filed Affidavit of Service of copies of summons and complaint on Basil Martos on 8/24/72 by taping copies, with order to show cause and Affidavit and Memorandum, to door of his apartment.	
Aug. 31-72	Filed Affidavit of Service of summons and complaint upon Athan Hamos on 8/25/72	
Aug. 31-72	Filed Affidavit of Service of summons, complaint, show cause, affidavit and Memorandum of Law on Basil Martos on 8/24/72.	
Aug. 31-72	Filed Affidavit of Service of Temporary Restraining Order, Order to Show Cause, Affidavit and Memorandum of Law on Konstantinos M. Tserpes, as Pres. Research Automation Corp. on 8/24/72.	
Aug. 31-72	Filed MEMO. END. on Show Cause filed 8/24/72. On consent of defendants and on their application, this motion for an injunction pendente lite is adjourned 10/18/72 at 10 AM ROOM 1105; no further adjournment to be granted.; the temporary restraining order directed against all defendants is continued with full force and effect, until further order of this court. So ordered. Ryan, J.	
Sep. 7-72	Filed letter from Research Automation Corp., deft. confirming conversation with Securities and Exchange Commission's granting a week's extension until 9/13/72 to answer the SEC's complaint.	
Oct. 18-72	Filed ANSWER OF DEFTS BASIL MARTOS & ATHAN HAMOS to the complaint.	
Nov. 8-72	Filed Notice of settlement by the plttf S.E.C. ret: 11-7-72.	
Nov. 8-72	Filed Order of preliminary injunction with affdvt of service attac	
Nov. 8-72	Filed deft Konstantinos M. Tserpes affdvt in opposition to preliminar injunction.	
Nov. 8-72	Filed deft Konstantinos M. Tserpes memorandum of law in support.	
Nov. 8-72	Filed Order of Preliminary Injunction the defts are directly or indirectly in the absence of any applicable statutory exemption preliminarily enjoined from making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, offer to sell or deliver after sale the common stock of Research Automation Corp. (for further details see injunction in file room) Mailed notices. It is further ordered that this Court shall retain jurisdiction of this matter for all purposes. 11-8-72 RYAN, J.	
Nov. 17-72	Filed Transcript of Proceedings, dated 9-31-72	
Nov. 30-72	Filed Notice of Appeal to the U.S.C.A. from the order of preliminary injunction enjoining defts from selling stock of deft Research Automation Corp. to private purchasers entered on Nov. 3-72 by Judge Ryan. \$5.00 paid. (mailed notice)	
Dec. 13-72	Filed Transcript of Proceedings, dated 10-18-72	
Jan. 6-73	Filed Record on appeal to U.S.C.A. 2nd Circuit 1-5-73	
Jan. 17-73	Filed stipulation that the record on appeal include the attached letter of 11-1-72.	
Jan. 17-73	Filed Supplemental Record on appeal has been certified & transmitted to the U.S.C.A. 2nd Circuit.	

DATE

FILINGS--PROCEEDINGS

AMOUNT
RECEIVED IN
EMPLOYMENT
RETURNS

pr 3.73 Filed True copy of USCA mandate. Ordered that this action is remanded
XXXXX to the SDNY Court to make further findings, etc.. 3 Judge Court. Lombard, CJ
GJ Mansfield, Wyzanski. DJ.

Oct. 3-73 Filed defts. affdnt & notice of motion to dismiss-Ret. 10-18-73.

Oct. 18-73 Filed memo endorsed on motion filed 10-3-73--No appearance in opposition
to motion by plttf. The relief sought by deft. is granted in full as
requested; submit order forthwith-So Ordered-Ryan, J.

Oct. 23-73 Filed order vacating the order of preliminary injunction dated 11-8-72
and all parts of the complaint which is the subject matter of this
proceeding alleging violations of Sec. 5 of the S.E.A. 1933 be dismissed.
---Ryan, J.

Oct 30-73 Filed unsigned counter order

Oct. 29-73 Filed notice of entry of order dated 10-23-73.

May 14.74 Filed Pltffs. Notice of Deposition of Research Automation Corp. by XXXXXXX
Konstantinos M. Tserpes, Pres. on 5/20/74.

May 14.74 Filed Pltffs. Notice of Deposition of Basil Martos on 5/21/74.

May 21.74 Filed Pltffs. Notice of Deposition of Athan Hamos on 5/29/74.

May 29.74 Filed Defts. Notice of Deposition of William Nortman on 6/10/74.

May 29.74 Filed Defts. Notice of Deposition of Thomas R. Beirne on 6/11/74.

May 29.74 Filed Defts. Notice of Deposition of Mark N. Jacobs on 6/11/74.

Jun 10.74 Filed Order to Show Cause for a Protective Order with a Stay. Ordered
defts. Tserpes, Martos & Hamos appear on 6/21/74 & that deposition of
William Nortman, Thomas R. Beirne & Mark N. Jacobs are adjourned
pending resolution of plttfs. motion for a protective order. etc.
Ryan J.

Jun 10.74 Filed Affidavit of Notice that Mark N. Jacobs XXXXXX gave notice of
the Order to Show Cause.

Jun 10.74 Filed Pltffs. Memorandum of Law.

Jun 10.74 Filed Affidavit of Service by Mark N. Jacobs on 6/5/74.

Jun 18.74 Filed Pltffs. Notice of Motion . Re: Striking Answers of defts. Research A
Automation Corp. & Konstantinos M. Tserpes & entering Judgment. ret. 6/21/74

Jun 18.74 Filed Pltffs. Memorandum of Law.

Jun 18.74 Filed Pltffs. Affidavit of Service by Anthony R. Kcamarata on 6/13/74.

Jun 18.74 Filed Pltffs. Response to Defts. Request for Documents.

Jun 20.74 Filed Affidavit in opposition to plttfs. application for a protective order
& Strike Defts. Answer & Default Judgment etc. by Konstantinos M. Tserpes.

Jun 20.74 Filed Memorandum of law in support of defts. Affidavit opposing plttf.s
motion pursuant to rules 26(c) & 37(d). etc.

DATE	FILED - PROCEEDINGS	AMOUNT RECEIVED IN ENFORCEMENT ATTORNS
Jun 20.74	Filed Defts. Statement in support of cross examination to compel Discovery pursuant to rule 37 FRCP.	
Jun 24.74	Filed Pltffs. Memorandum in reply to defts. memorandum of Law & affidavit in opposition to pltffs. motion pursuant to rules 26(c) & 37(d) FRCP.	
Jun 26.74	Filed Defts. Konstantinos M. Tserpes, Basil Martos, Athan Hamos Notice of Motion & supporting affidavit. Re: 3rd Pty Complaint. ret. 7/10/74.	
6-21-74	PRE-TRIAL CONFERENCE HELD BY <i>Raby</i>	
Jul 10.74	Filed Pltffs. Affidavit in opposition by Alexander Bienenstock to defts. appl for leave to serve 3rd pty complaint.	
Jul 10.74	Filed Pltffs. Affidavit of Service by Mark N. Jacobs on 7/9/74.	
Jul 10.74	Filed Pltffs. Memorandum of Law.	
Jul 25.74	Filed Deft's. (Tserpes, Martos & Hamos) objection to Magistrates Report.	
Aug 7.74	Filed Deposition of Athan Hamos on 5/29/74. (mailed notice)	
Aug 7.74	Filed Deposition of Basil Martos on 5/21/74. (mailed notice)	
Aug 7.74	Filed Continued Deposition of Basil Martos on 5/22/74. (mailed notice)	
Aug 7.74	Filed Deposition of Konstantinos M. Tserpes on 5/20/74. (mailed notice)	
Aug 7.74	Filed Defts. objection to the Report of the US Magistrate.	
Aug 7.74	Filed Reply Affidavit by Konstantinos M. Tserpes.	
Aug 7.74	Filed Memorandum of law in support of defts. application for leave to sue The USA.	
Aug 7.74	Filed Magistrate Raby Report dtd. 6/25/74.	
Aug 7.74	Filed Magistrate Raby Report dtd. 7/17/74.	
Aug 7.74	Filed Memorandum of defts. application for leave to sue the USA by defts. Kons	
Aug 7.74	Filed Final Judgment & Order that the answer of defts. filed 9/12/72 is stricken as indicated & that defts. RAC & Tserpes their nominees, agents, et al are permanently enjoined from as indicated, & that pltffs. motion for a protective order with respect to the deposition of pltffs. counsel is granted, & Defts motion to tape record the remainder of the deposition is denied, Defts. motion to compel disclosure of certain documents is denied, Defts. motion to file 3 pty complaint or counterclaim is denied, etc. Ryan J. Judgment Ent. 8/7/74, E 8/8/74. (mailed notice)	
8/7/74	Filed Memo. Ent. on motion dtd. 6/8/74. Motion disposed of by my judgment & order of this date. Ryan J. (mailed notice)	
Aug 7/74	Filed Memo. Ent. on motion dtd. 6/26/74. Motion disposed of by my Final Judgment & Order of this date. Ryan J. (mailed notice)	
Oct 11.74	Filed Defts. notice of appeal from the Final Judgment & Order as entered on 8-7-74 enjoining Defts., etc. Mailed notice to William D. Moran, SEC.	

Continued

DATE	PROCEEDINGS	Date Order Judgment N
29-74	Certified Record to the USCA.	
5-75	Filed Pltffs. affidavit and notice of motion for an order compelling deft. Konstantinos M. Tserpes to appear for deposition. Ret. 8-18-75	
6-75	Filed Pltffs. Memorandum of Law.	
15-75	Filed True Copy of USCA Mandate with opinion. Ordered that the judgment & order of said district are affirmed in part & reversed in part & that the action is hereby is remanded to said District Court for further proceedings with the entire costs of this appeal, including the appellee's costs to be taxed against the appellant pursuant to Rule 39(c)FRAP in accordance with the opinion of this court. Judgment Entered 8-18-75 Clerk Entered 8-22-75 (mailed notice)	
9-24-75	Filed affidavit & Order that deft. Konstantinos M. Tserpes appear at the office of the S.E.C., 26 Federal Plaza, N.Y.C. for the taking of his deposition. Ryan, (mailed notice)	
10-23-75	Filed Stip & Order that the Clerk is ordered to pay out of the registry of the Court the sum of \$250. Ryan J. 10-30-75 Memo. End on this Stip. Rec'd Check \$6000, dtd. 10-28-75 amt. \$250.00 payable to Research Automation Corp. Signed by Anna K. Tserpes, Secretary of Research Automation Corp.	
9-76	Filed Pltffs. Notice of Deposition of Konstantinos M. Tserpes on 9-30-76.	
9-76	Filed Affidavit & Notice of Motion by defts named that they will bring the attached motion on for hearing before Ryan J. on 6-10-76 as indicated.	
10-76	Filed Pltffs memorandum of law in opposition to motion of defts Konstantinos M. Tserpes, et al to dismiss the complaint.	
11-76	Filed Affidavit of Service by Philip M. DiLaura as indicated dtd 6-11-76.	
1-76	Filed Notice that plttf will take deposition of Anna Tserpes on 7-27-76.	
6-76	Filed Notice that plttf will take deposition of Athan Hamos on 10-12-76.	
7-76	Filed Notice that plttf will take deposition of Basil Martos on 10-5-76.	
6	Filed Pltffs Affidavit of Service by Iris M. Bratt, dtd 9-1-76.	
6	Filed Affidavit & Notice of Motion by deft Basil Martos for an order granting protective order purs to Rule 26 of the FRCP. for the reasons indicated rble before Ryan, J. on 9-30-76.	
10-76	Filed defts memorandum of law in support of said protective order.	
11-76	Filed Pltffs affidavit in opposition to deft Martos' motion for a protective order.	
11-76	Filed memorandum of law in support of deft Martos motion for a protective order.	
6-76	Filed defts Affidavit & Notice of Motion for an order granting a protective order for the reasons indicated rble on 10-5-76.	
6-76	Filed defts memorandum of law in support of said motion.	
6-76	Filed defts affidavit in opposition to plttfs affidavit in opposition to defts motion for a protective order.	
10-6-76	Filed memorandum of law in opposition to plttfs memorandum of law dtd. 9-30-76.	
10-6-76	Filed memo endorsed on motion filed 9-28-76. Motion denied. Ryan, J. W/A	
10-6-76	Filed memo endorsed on motion filed 5-28-76. The motion to dismiss the balance of the complaint, is denied. Ryan, J. M/N.	
10-6-76	Filed Order that deft Martos' motion for a protective order be denied in all respects and further ordered that this Court shall retain jurisdiction of this matter for all purposes and all pretrial discovery is referred to a Magistrate for supervision. Ryan, J. M/N.	
11-15-76	Filed memo endorsed on motion filed 10-6-76. The motion of deft Athan Hamos is denied. Ryan, J. M/N.	
11-27-76	Filed Affidavit & Notice of Motion by defts named to vacate the permanent injunction on Research Automation Cor. etc. rble on 11-22-76.	
11-76	Filed Notice that Konstantinos M. Tserpes-Basil Martos, and Athan Hamos, defts, hereby appeals to the U.S.C.A.P. from the order of 10-6-76. as indicated, M/N.	

P65

JUDGE RYAN

PROCEEDINGS

DATE.

- 11-16-76 Filed Pltffs memo of law in opposition to defts motion to vacate, etc, as indicated.
- 11-16-76 Filed Pltffs Affidavit in opposition to defts motion to vacate etc, as indicated.
- 11-15-76 Filed Affidavit of Service as indicated.
- 12-11-76 Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A. on 12-14-76.
- 1-28-77 Filed Pltffs. notice of motion for an order pursuant to Rule 37 (d) of the Federal Rules of Civil procedure. Ret. 2/8/77.
- 1-28-77 Filed Pltffs. memorandum of law in support of motion for an order pursuant to Rule 37(d) Fed. R. Civ. P.
- 1-31-77 Filed True copy of U.S.C.A. mandate appellees motion filed on 12-20-76 to dismiss the appeal for lack of Jurisdiction is Granted. m/n
- 2-24-77 Filed order denying deft's motion to vacate the final judgment of permanent injunction against deft RAC and to dismiss the balance of complaint against deft TSERPES, MARTOS AND HAMOS. Ryan J.
- 2-24-77 Filed memo end. on motion dated 10-27-76 Motion denied for all reasons set forth in the order entered herewith Ryan J.
- 2-24-77 Filed memo end. on motion dated 1-28-77 Motion is referred to Mag. Schreiber who is supervising the discovery herein. So ordered Ryan J.
- 2-24-77 Filed order compelling deft Hamos to attend his deposition. Ryan J.
- 2-25-77 Filed order compelling Deft. Hamos to attend his deposition....RYAN.J
- 3-1-77 Filed entry of appearance of Steve Giano, Esq. for the purposes of preparing and filing a motion to vacate the permanent injunction against Research Automation Corp. and to dismiss the balance of the complaint against Research Automation Corp., .. for the purposes of
- 3-1-77 Filed entry of appearance of Steve Giano, Esq., for the purposes of depositions which are to be taken of Basil Martos.
- 3-11-77 Filed Stipulation and undertaking as to deft. Athan Hamos, deft. Hamos shall be deemed dismissed without costs to either party.....So ordered RYAN.J.
- 3-28-77 Filed defts. notice of appeal to the 2nd Circuit U.S.C.A. for an order denying motion to dismiss the balance of the complaint against defts (TSERPES AND MARTOS) entered on the 24th day of Feb. 1977. Mailed cc on 3-28-77.

TABLE OF INDEX

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Mr. Moran's (Defendants) Letter dated 7/26/76 (refer to Page 2--lines 7-9--discrimination & injustice)	2-4
U.S. Court of Appeals Decision dated 7/23/75 (refer to Pages 5018 and 5019 therein)	5-13
District Court's "Final Judgement and Order dated dated 8/7/74	14-17
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U.S. Court of Appeals Decision dated February 13, 1973 remanding the case to the District Court for "Finding of Facts"	19
Order of Preliminary Injunction dated 11/8/72	20-23

You are also requested to refer to the balance of
of the documents which were transmitted to the
Court of Appeals.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

- against -

72 Civil 3513 (SJR)

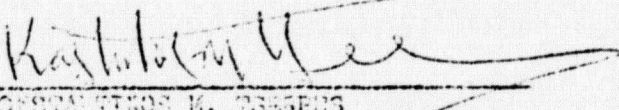
RESEARCH AUTOMATION CORPORATION
KONSTANTINOS M. TSERPES
BASIL MARTOS

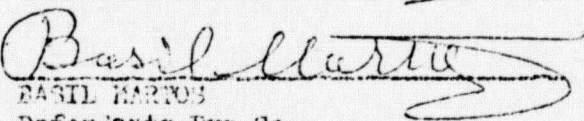
NOTICE OF APPEAL

Defendants,

NOTICE is hereby given that KONSTANTINOS M. TSERPES and BASIL MARTOS, defendants above named, hereby appeal in the United States Court Of Appeals for the Second Circuit for an order denying motion to dismiss the balance of the complaint against defendants (TSERPES and MARTOS) entered on the 24th day of February 1977.

DATED: NEW YORK, NY
MARCH 23, 1977


KONSTANTINOS M. TSERPES


BASIL MARTOS
Defendants Pro Se
333 West 39 Street
New York, N. Y. 10018
Tel. (212) 947-1460

TO: WILLIAM D. HODAN
REGIONAL ADMINISTRATOR
SECURITIES & EXCHANGE COMMISSION
26 Federal Plaza
New York, N. Y. 10007



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REGIONAL OFFICE
26 FEDERAL PLAZA
NEW YORK, N.Y. 10007

IN REPLYING PLEASE QUOTE

NY:E:MNJ

1

July 26, 1976

Konstantinos M. Tserpes, President
Research Automation Corporation
333 West 39th Street
New York, New York 10018

Re: S.E.C. v. Research Automation Corp., et al.
72 Civil 3513 (SJR)

Dear Mr. Tserpes:

1 I am in receipt of your letter dated July 22, 1976.
Although it is not clear to me exactly what you are requesting
(1) 3 in the first paragraph of that letter, I will attempt to
answer nonetheless.

5 If you are requesting that the SEC not object to Research
Automation Corporation ("RAC") being represented by counsel,
7 please be advised that the Commission cannot and will not
preclude you from being so represented. In fact, you will
(2) 9 recall, the staff, as well as Judge Ryan and the judges of
the United States Court of Appeals for the Second Circuit,
11 told you of the advisability of being represented by counsel
and the dangers inherent in proceeding without the benefit
13 of counsel.

With respect to the above-captioned matter, however, you
15 are aware that RAC was permanently enjoined from further violations
(3) 17 of the anti-fraud provisions of the federal securities laws on
August 7, 1974. On July 23, 1975, more than one year ago, the
United States Court of Appeals for the Second Circuit affirmed

NOTE: YOUR KIND ATTENTION IS TURNED TO PAGE 2 OF THIS LETTER
ON WHICH THE DISTRICT COURT BASED ITS DECISION AND NOT
ON THE REALISTIC FACTS, JUSTICE, AND THE DOCUMENTS
SUBMITTED BY THE DEFENDANTS.. IS THIS WHAT WE CALL JUSTICE??????

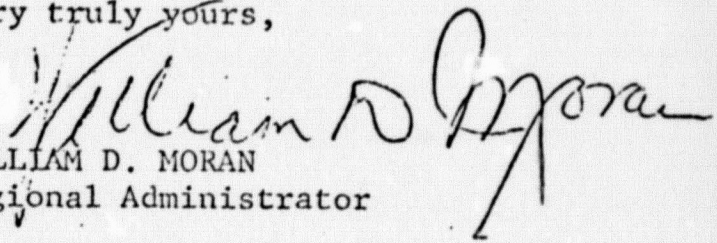
19 that Final Judgment of Permanent Injunction entered against RAC.
 Although the Second Circuit affirmed that judgment "without
 21 prejudice to [RAC's] right to seek to reopen the judgment in the
 district court upon satisfying the court that its officers were
 23 unaware of the requirement [that a corporation may not appear
 in a lawsuit against it except through an attorney] and that it
 25 will promptly appear through counsel," the staff will recommend
to the Commission that it vigorously oppose any attempt to reopen
 27 the judgment at this late date.

Finally, with respect to the remarks contained in the second
 29 paragraph of your letter concerning "ethnic discrimination," you
 31 have misquoted Mark Jacobs' affidavit dated August 22, 1972. If
 you read paragraph 19 on page 6 of that affidavit, which you cite,
 you will note that Mr. Jacobs stated the following:

33 19. My investigation further revealed
 that the investors did not have a relationship
 35 with RAC which gave them access to the kind of
 information about the corporation that registration
 37 would have disclosed, or which would be included
 in a prospectus, or would necessarily be provided
 39 to offerees of a qualified private placement.
 Specifically, almost all of the approximately 92
 41 investors are Greek immigrants to the United States
 and many are unable to read or write English. Many
 43 of them are unsophisticated in securities investments.
 Most had not purchased any securities prior to their
 45 investment in RAC. None had signed a letter of
 investment intent. None had seen any financial
 47 statements of RAC in connection with the offer or
 sale of the stock. In addition, the false statements
 49 and materials omissions, which are the subject of the
 following section, which were made to these investors
 51 in connection with their purchase of the stock are
 further evidence that these investors were not provided
 53 with the quality or quantity of information necessary
 to sustain a private placement exemption.

55 Clearly, you have misquoted, twisted and taken out of context
⑦ statements made in reply to your assertion of the private placement
57 exemption.

Very truly yours,


WILLIAM D. MORAN
Regional Administrator

cc.:

Honorable Sylvester J. Ryan

Honorable Irving Sommer

LIT FILES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 600—September Term, 1974.

(Argued May 28, 1975

Decided July 23, 1975.)

Docket No. 74-2393

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

RESEARCH AUTOMATION CORPORATION, et al.,

Defendants,

KONSTANTINOS M. TSERPES, BASIL MARTOS,

ATHAN HAMOS,

Defendants-Appellants.

Before:

CLARK, *Associate Justice,**

HAYS and MANSFIELD, *Circuit Judges.*

Appeals, in an action charging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, from orders of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, (1) granting a default judgment pursuant to Rule 37(d), F.R.Civ.P., against a defendant who appeared but refused

* Supreme Court of the United States, retired, sitting by designation.

to be sworn or to testify at his pretrial deposition, (2) granting a default judgment against a corporation which had not appeared in the proceeding through counsel, (3) denying defendants' motion for leave to file a third-party complaint for damages against the United States Government, and (4) granting a protective order to the Commission and denying defendants' various pretrial motions.

Affirmed in part and reversed in part.

KONSTANTINOS M. TSERPES, BASIL MARTOS, ATHAN-
HAMOS, New York, N.Y., *Defendants-Appel-*
lants Pro Se.

MARTIN S. BERGLAS, Attorney, Securities and
Exchange Commission (Lawrence E. Ner-
heim, General Counsel, Walter P. North,
Senior Assistant General Counsel, Securi-
ties and Exchange Commission, Washing-
ton, D.C., of counsel), *for Plaintiff-Appellee.*

MANSFIELD, *Circuit Judge:*

The principal issue on this appeal is whether a district judge has the power under Rule 37(d), F.R.Civ.P., to enter a default judgment against a defendant who appears for the taking of his pretrial deposition but, in a willful effort to disrupt and to impede discovery, refuses to be sworn or to testify. We hold that under these circumstances, unless the plaintiff first obtains a court order pursuant to Rule 37(a), F.R.Civ.P., directing the defendant to testify, the court lacks the power to impose this severe sanction.

On August 12, 1972, the Securities and Exchange Commission ("SEC" herein) commenced an action against the defendants seeking injunctive relief against their alleged

violations of §5 of the Securities Act of 1933, 15 U.S.C. §77e (registration provisions), various antifraud provisions of that Act, §17(a), 15 U.S.C. §77q(a), and of the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78j(b), and Rules and Regulations thereunder, in connection with the offer and sale of securities of Research Automation Corporation ("RAC" herein).

A preliminary injunction was granted by the district court. Following an appeal by the defendants, the SEC decided to drop the §5 charges and we remanded the case for findings of fact to the district court where it remained dormant for several months pending negotiations for a settlement that never materialized. Thereafter the SEC noticed the taking of the deposition of defendant Tserpes, President of RAC, for May 20, 1974, at the SEC's New York Regional Office, requesting him to bring with him certain documents. Tserpes appeared at the designated time and place but refused to enter the room where his deposition was to be taken, insisting on seeing William D. Moran, Administrator of the SEC's New York Regional Office, who was engaged in conference on other business at the time. The SEC planned to have the examination of the witnesses conducted by Mark N. Jacobs, a staff attorney. Tserpes finally succeeded in forcing Mr. Moran to leave his other business in order to receive the documents personally before Tserpes would enter the room where his deposition was to be taken, all of which wasted about one and a half hours. Upon entering the room where Jacobs was waiting to depose him, Tserpes proceeded to engage in a course of obstructive conduct that made it impossible for Jacobs to take the deposition. Tserpes' obstructive tactics took the form of his erroneously insisting that certain discussions had not been transcribed by the court reporter, haranguing Jacobs with statements to the effect that Tserpes did not pro-

pose to be deposed by Jacobs, whom he distrusted and characterized as a "liar," or by anyone associated with him, and finally by his refusing to be sworn when Jacobs repeatedly asked the reporter to administer the oath. Finding it impossible to proceed, Jacobs adjourned Tserpes' deposition and then attempted unsuccessfully to take the depositions of Martos and Hamos, the other RAC officers. In this effort he was frustrated by the further disruptive efforts of Tserpes who, appearing pro se, proceeded to volunteer statements, interrupt the questioning, answer questions put to the deponents, and attack Jacobs personally. Finally Jacobs was compelled by this conduct to adjourn the depositions entirely.

The SEC responded to Tserpes' conduct by moving in the district court, purportedly pursuant to Rule 37(d), F.R.Civ.P., for an order which would strike the answers of the defendants RAC and Tserpes and enter a default judgment against them. Magistrate Harold L. Raby, to whom the motion was referred, found after a hearing that Tserpes had deliberately engaged in a course of conduct designed to harass the SEC, to obstruct the taking of the depositions, and to sabotage the orderly conduct of the proceedings in the case. With respect to Tserpes' disruption of the depositions of Marcos and Hamos, the Magistrate further found that Tserpes had "outrageously injected himself into the depositions which the S.E.C. was trying to conduct respecting the other two defendants and in effect, by the process of filibuster made it impossible to depose the other two witnesses." With reference to Tserpes' request for a Greek-English interpreter and his contention, which he reasserts here, that his conduct was due largely to his inability to understand the English language, Magistrate Raby observed that Tserpes appeared to possess fluency in English and that in any event

he had failed to make a showing of indigency required for appointment of an interpreter.¹

Accepting Magistrate Raby's recommendations, Judge Ryan granted the SEC's motion, striking the answers of Tserpes and RAC and entering a default judgment against them. By separate orders the court denied a motion by the defendants for leave to file a complaint seeking damages from the United States Government as a third-party defendant for alleged obstruction of RAC's public stock offering that was the subject of the SEC's proceeding against the defendants and denied various pretrial motions by the defendants including motions to tape-record

1 Magistrate Raby stated:

"In any event, the claimed inability of Mr. Tserpes to speak and understand the English language, was, and is, in my view, a ploy and a patent fraud upon this Court. Notwithstanding Tserpes' insistence that he cannot speak and understand the English language adequately, I found him to be completely articulate (albeit offensively so) in his utterances before me, and I am convinced that he fully understood the proceedings held before me. That conclusion finds overwhelming support from a reading of the text of the recent depositions admitted to be conducted by the S.E.C., in which Tserpes was not only able to speak and understand English (as were the other individual defendants) but able to disrupt and abort the deposition by a tirade and a filibuster.

• • • • •

"Tserpes has filed papers in connection with the motions under my consideration which indicate a high command of the English language and a high degree of intelligence. It is to be noted, moreover, in his initial session before your Honor, he stated in open court that he had taken courses in the law both in Europe and in the United States. Yet, this same person who is capable of conducting a tirade against the S.E.C. counsel in the English language in the course of his deposition or attempted deposition had the temerity to come before me, on the day set for argument of this motion, and suggest that because of his lack of command of the English language he was entitled to an interpreter and entitled to have this matter adjourned until the Court would see fit to supply him with the free services of an interpreter."

Appellants' pro se brief before this court was obviously prepared by a person who not only is well versed in the English language but apparently has had a legal education.

the depositions, to restrict the scope of the examinations of Martos and Hamos, and for other relief. The district court also granted a protective order to the SEC precluding the plaintiffs from taking the depositions of various SEC attorneys. This purported appeal followed.

DISCUSSION

A default judgment granting relief against a defendant for failure to cooperate in pretrial discovery is a harsh sanction, which must be cautiously used, see *Flaks v. Koegel*, 504 F.2d 702, 707-08 (2d Cir. 1974); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614-15 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965), lest the resulting grant of relief amount to a deprivation of property without due process, see *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). Recognizing the severity of the sanction of a judgment granting affirmative relief by default, we have held that, notwithstanding the elimination of the term "willful" from Rule 37 as a result of the 1970 amendments, the sanction should not be imposed because of negligence, and that the plaintiff must demonstrate that the defendant's failure to comply is due to willfulness, bad faith or fault and not to an inability to comply. *Flaks v. Koegel, supra*, 504 F.2d at 708-09.

The drafters of Rule 37(d) provided that the court might impose the sanctions available under Rule 37(b)(2), which include the entry of a default judgment, when a party "fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice." In recognition of the policy against a grant of relief by default except in a clear case, we believe that the term "appear" as used in Rule 37(d) must be strictly construed, limiting it to the case where a defendant literally fails to show up for a deposition session. Where a defendant does

in fact appear physically for the taking of his deposition but refuses to cooperate by being sworn and by testifying, the proper procedure is first to obtain an order from the court, as authorized by Rule 37(a), directing him to be sworn and to testify. This serves the purpose of impressing upon the defendant the seriousness of his actions and avoids a default judgment resulting from some misunderstanding on his part. If the defendant then disobeys the court's order, Rule 37(b) authorizes the court to impose the drastic sanction of default. Since Tserpes did in fact appear for the taking of his deposition, Rule 37(d) could not properly be invoked in this case to grant a default judgment against him.

The SEC, relying principally on Judge Skelly Wright's decision in *Bourne, Inc. v. Romero*, 23 F.R.D. 292, 296-97 (E.D. La. 1959), argues that Tserpes' mere physical presence did not amount to an "appearance" within the meaning of Rule 37(d) when he refused to be sworn or to testify. Although language along these lines may be found in *Bourne*, Judge Wright was dealing with a readily distinguishable situation. There the defendants' refusal to be sworn or to testify and produce documents was in willful defiance of an outstanding subpoena issued by the court ordering them to do so, which had been personally served upon them. Thus their conduct clearly constituted contempt of court. The default judgment, moreover, was entered only after the defendants had been afforded several opportunities to comply. No such order has been obtained in the present case.

The other decisions relied upon by the SEC do not support its position that, absent a court order, Rule 37(d) empowers the court to enter a default judgment against a party who appears but refuses to testify. In each case the party either failed to appear or disobeyed a court

order. See, e.g., *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965) (failure to appear); *Fong v. United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 338 (1962) (refusal to return to taking of deposition); *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944) (failure to appear, defiance of court orders); *Brady v. Hearst Corp.*, 281 F. Supp. 637 (D. Mass. 1968) (failure to appear and defiance of court order). In a situation remarkably similar to that encountered in the present case, the court in *Securities and Exchange Commission v. American Beryllium & Oil Corp.*, 303 F. Supp. 912, 920 (S.D.N.Y. 1969), which was not cited to us by either party, held that the SEC was not entitled under Rule 37(d) to a default judgment against a party who appeared but refused to testify, even though the SEC contended that his purpose was to impede the discovery process. The court held that a default judgment would be warranted only if the SEC obtained a court order pursuant to Rule 37(a). We agree with this interpretation of Rule 37(d).

The district court's entry of a default judgment against RAC, a New York corporation, stands on a different footing. The only purported appearance of RAC in this case has been through its officers, Tserpes, Martos and Hamos, none of whom is an attorney. It is settled law that a corporation may not appear in a lawsuit against it except through an attorney, *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426 (2d Cir. 1967), and that, where a corporation repeatedly fails to appear by counsel, a default judgment may be entered against it pursuant to Rule 55, F.R.Civ.P., *id.* RAC's officers named as defendants appeared pro se in the present case and it is unclear whether they were aware of this requirement of a corporate party. Furthermore, the district court does

Important
Also see
Page 5019

The SEC is vigorously
denying us this
legal right

not appear to have based its action in granting a default judgment upon Rule 55. For these reasons, although we affirm the entry of a default judgment against RAC, we do so without prejudice to its right to seek to reopen the judgment in the district court upon satisfying the court that its officers were unaware of the requirement and that it will promptly appear through counsel.

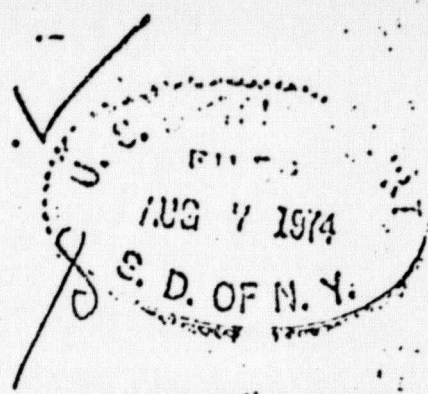
We need not dwell at length upon the other matters which the defendants seek to raise upon this appeal. Substantially for the reasons stated by Magistrate Raby in his report of July 17, 1974, there was no abuse of discretion in the district court's denial of the defendants' motion for leave to sue the United States Government for a total of some \$7,700,000 based upon the SEC's alleged frustration of RAC's public offering of stock under Regulation A. The district court clearly lacked jurisdiction to review the Commission's decision to institute and maintain the present action. See Administrative Procedure Act §10, 5 U.S.C. §701(a)(2), Securities Act of 1933 §20(b), 15 U.S.C. §77t(b), Securities Exchange Act of 1934 §21(e), 15 U.S.C. §78u(e); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950). The defendants' attempted appeal from the district court's orders disposing of various pretrial discovery motions must be dismissed since the orders are interlocutory and not appealable in the absence of any permission granted pursuant to 28 U.S.C. §1292(b). See 28 U.S.C. §1291; *American Express Warchousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277 (2d Cir. 1967).

For the foregoing reasons we reverse the district court's order granting a default judgment against Tserpes, without prejudice to the SEC's right, upon remand, to seek an order against him pursuant to Rule 37(a). The default judgment against RAC is affirmed, without prejudice to

RAC's moving to reopen the judgment upon a proper showing. We affirm the district court's denial of appellants' motion for leave to file a third-party complaint seeking damages against the United States Government. We dismiss the purported appeal from the district court's grant of a protective order requested by the SEC and rulings with respect to pretrial discovery matters.

Although the district court's decision is reversed in part, the SEC's motion for a default judgment and this appeal are attributable to the conduct of the appellants and particularly that of Tserpes in willfully seeking through various improper means to obstruct and impede the proceedings in the district court. Had Tserpes not attempted, as Magistrate Raby found, "to make a farce out of the judicial process of [the] Court," no appeal would have been necessary. In view of these circumstances the entire costs of this appeal, including appellee's costs, will be taxed against the appellants pursuant to Rule 39(a), F.R.A.P.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

- against -

RESEARCH AUTOMATION CORPORATION
KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS

Defendants.

72 Civil 3513 (SJR)

FINAL JUDGMENT
AND ORDER

MICROFILM

AUG 7 1974

The Complaint in this action having been filed on August 17, 1972, and defendants Konstantinos M. Tserpes ("Tserpes"), Basil Martos ("Martos") and Athan Hamos ("Hamos") having served plaintiff Securities and Exchange Commission ("Commission") with an answer on September 12, 1972; and

Plaintiff having moved this Court for an order striking the answers of defendants Research Automation Corporation ("RAC") and Tserpes and granting judgment by default for permanent injunctive relief against them; and for a protective order vacating the proposed depositions of plaintiff's counsel, William Nortman, Thomas R. Beirne, and Mark N. Jacobs; and

Defendants having moved this Court for an Order permitting defendants to record the remainder of the depositions noticed herein, excluding certain alleged improper questions, and direct-

ing that all future depositions be held in the United States Court House; and for an Order compelling the production by the plaintiff of certain documents requested by the defendants; and for leave of this Court to serve and file a proposed third party complaint or counter-claim against the United States of America; and

This Court having considered all the papers filed by both parties and having considered the reports of the Honorable Harold J. Raby, United States Magistrate, to whom these matters were assigned, issued on June 25, 1974 and July 17, 1974, and having considered the defendants' objections to these reports and having found such objections to be without merit; and there being no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the answer filed by the defendants on September 12, 1972 be and it hereby is stricken insofar as it speaks for defendants RAC and Tserpes, and that defendants RAC and Tserpes, their nominees, agents, servants, employees, attorneys, successors and assigns, and those persons in concert or active participation with them, and each of them, be and they hereby are permanently enjoined from, directly and indirectly, in connection with the offer, sale, or purchase of the shares of the common stock of RAC or any other security,

making use of any means or instruments of transportation or communication in interstate commerce or of any facility of any national securities exchange:

(1) To employ any device, scheme, or artifice to defraud, or

(2) To offer, purchase or sell securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any use, practice or course of business which operates or would operate as a fraud or deceit upon any person.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

(1) Plaintiff's motion for a protective order with respect to the depositions of plaintiff's counsel, William Norman, Thomas R. Batina, and Mark N. Jacobs be and it hereby is granted;

(2) Defendants' motion to tape record the remainder of the depositions, to exclude certain alleged improper questions and to hold the depositions in the United States Court House be and it hereby is denied;

(3) Defendants' motion to compel disclosure of certain documents by the plaintiff be and it hereby is denied; and

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(4) Defendants' motion for leave of this Court to serve and file a proposed third party complaint or counter-claim against the United States of America and/ or the Securities and Exchange Commission be and it hereby is denied.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

Lawrence R. ...
UNITED STATES DISTRICT JUDGE

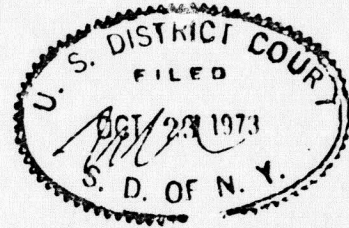
Dated: New York, New York
August 7th, 1974

JUDGMENT ENTERED *August 7*, 1974

Raymond H. Berglund
CLERK

AFFIDAVIT OF KONSTANTINOS TSERPES ON BEHALF OF PETITIONER-APPLICANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

RESEARCH AUTOMATION CORPORATION,
KONSTANTINOS M. TSERPES,
BASIL MARTOS,
ATHAN HAMOS,

72 Civ. 3513 (SJR)

ORDER VACATING PRELIM-
INARY INJUNCTION AND
STRIKING PORTIONS OF
COMPLAINT

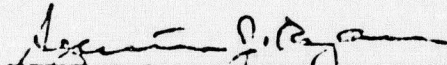
Defendants.
-----X

The defendants having moved to vacate the Order of Preliminary Injunction of MR. JUSTICE SYLVESTER J. RYAN, dated November 8, 1972, and to dismiss those parts of the Complaint in this proceeding alleging violation of Section 5 of the Securities Act; and on October 18, 1973, the return date of said motion, the plaintiff having failed to appear and having failed to oppose said motion; it is hereby

ORDERED, ADJUDGED AND DECREED that the Order of Preliminary Injunction of MR. JUSTICE SYLVESTER J. RYAN, dated November 8, 1972, be and is hereby vacated;

AND IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that all parts of the Complaint which is the subject matter of this proceeding alleging violations of Section 5 of the Securities Act of 1933 be and the same are hereby dismissed.

Dated: New York, N. Y.
October 23rd, 1973


UNITED STATES DISTRICT JUDGE
EXHIBIT B

73-1922

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-three.

Securities and Exchange Commission,

Plaintiff-Appellee,

v.

Research Automation Corporation

Konstantinos N. Tsorpos

Basil Horton

Athen Lemos

Defendants-Appellants

It is hereby ordered that the motion made herein by counsel for the by notice of motion dated February 12, 1973, to remand the action to the United States District Court for the Southern District of New York pursuant to Rule 51(a) Federal Rules Civil Procedure and Konstantinos N. Tsorpos, Appellant having appeared pro-se and this court having advised said appellants, at length, of the problems and danger inherent in proceeding on appeal without the assistance or benefit of counsel.

Upon consideration thereof, it is Ordered that the action herein be and it hereby is remanded to the United States District Court for the Southern District of New York to make further findings and with authority to act as it finds to be warranted under the circumstances.

A. DANIEL FOGARO,
Clerk

BEFORE: HON. J. EDWARD LUMBARD,

HON. WALTER M. HANSFIELD,
Circuit Judges

HON. CHARLES EDWARD WYZANSKI,
District Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed 11-8-72
S.D.N.Y.

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

72 Civil 3513 (SJR)

-against- :

RESEARCH AUTOMATION CORPORATION :
KONSTANTINOS M. TSERPES :
BASIL MARTOS :
ATHAN HAMOS :

Defendants. :

ORDER OF PRELIMINARY
INJUNCTION

The Complaint in this action having been filed on August 17, 1972, and defendants Research Automation Corporation, Konstantinos M. Tserpes, Basil Martos and Athan Hamos having been duly served with copies of the Summons and Complaint; and this Court, on August 24, 1972, having signed an Order to Show Cause and a Temporary Restraining Order, directing that said defendants show cause, if any there be, on August 31, 1972 why a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure should not be granted; and this Court, on August 31, 1972, having ordered that, on consent of defendants and on their application, the hearing on the motion for a preliminary injunction be adjourned until October 18, 1972, that no further adjournments be granted, and that the Temporary Restraining Order directed against all defendants be continued with full force and effect until further order of this Court; and, on October 18, 1972, said defendants having failed to timely appear and oppose said motion; and the Court having found that the plaintiff has made a prima facie case, on the basis of the papers filed herein, warranting the issuance of a preliminary injunction, and there being no

just reason for further delay, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendants Research Automation Corporation, Konstantinos M. Tserpes, Basil Martos and Athan Hamos, their nominees, agents, servants, employees, attorneys, successors and assigns, and each of them, be and they hereby are in the absence of any applicable statutory exemption, preliminarily enjoined from:

- (1) directly or indirectly, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, offer to sell or deliver after sale, through the use of the medium of any prospectus or otherwise, the common stock of Research Automation Corporation or any securities issued by Research Automation Corporation, its subsidiaries, affiliates, successors, or assigns, or any other securities, unless and until a registration statement has been filed with the Commission as to such securities or while such registration statement is the subject of a refusal or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act of 1933:
- (2) directly or indirectly carrying such securities or causing them to be carried through the mails or in interstate commerce by any means or instruments

of interstate transportation for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities.

AND IT IS FURTHER ORDERED that defendants Research Automation Corporation, Konstantinos M. Tserpes, Basil Martos, Athan Hamos, their nominees, agents, servants, employees, successors, and assigns be and they hereby are preliminarily enjoined from, directly and indirectly, in connection with the offer, sale or purchase of the shares of the common stock of Research Automation Corporation or any other security, making use of the means or instruments of transportation or communication in interstate commerce or of any facility of any national securities exchange:

- (1) to employ any device, scheme or artifice to defraud, or
- (2) to offer, purchase or sell securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

13/14
rh

A TRUE COPY
JOHN LIVINGSTON, Clerk
BY E. A. Beden
Deputy Clerk

S. Sylvester J. Ryan
UNITED STATES DISTRICT JUDGE